No. 394.

Brief of Blair for Appellee.

Filed Dec. 10, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 394.

THE UNITED STATES, APPELLANT,

vs.

EDWARD P. BLISS, EXECUTOR OF DONALD McKAY, DECEASED.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

JOHN S. BLAIR,
Attorney.

LAW REPORTER PRINT.

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This is an appeal by the United States from a judgment of the Court of Claims in favor of the appellee for $38,975.45. The Attorney General has no objection to $11,551.08, and assigns for error the allowance by the court below of $27,424.37 for additional cost of the gunboat *Ashuelot* to the contractor by reason of advance in prices during delays caused by the United States. The suit was brought under the provisions of an act of Congress for the relief of Nathaniel McKay and the executors of Donald McKay (26 St. 1247), set out in full at page 11 of this Record.

For the proper interpretation of this statute, "regard is to be had," as was said by Mr. Justice Gray in United States *vs.* Wong Kim Ark, 169 U. S. 649 and 653,—

> "not only to all parts of the act itself and of any former act of the same law-making power, of which

the act in question is an amendment; but also to the condition and to the history of the law as previously existing, and in the light of which the new act must be read and interpreted."

See also Blake *vs.* National Bank, 23 Wall. 307.

I.

History of the Law.

The progress of the construction of iron-clad steam gunboats became a matter of public history June 29, 1864, when the Senate adopted the following resolution:

> "*Resolved*, That the Committee on the Conduct of of the War be instructed to inquire what progress has been made in the construction of the iron-clad steam gunboats contracted for in the year 1862, by whom the contract was made on the part of the Government, who planned the models of the same, and who is responsible therefor; have any of them been finished; if so, what was the condition of the vessel after she was launched; are the other vessels contracted for to be built on a plan or model similar to the *Chimo*, lately launched at Boston; and all information which may be had touching said gunboats.
>
> See Page I, Report on the conduct of the War, 2d Session, 38th Congress. Part 3, Senate Report 142, entitled Light Draft Monitors.

The Committee on the Conduct of the War took testimony and received communications until March 2, 1865, and reported one hundred and twenty pages of information on the subject. Senate Report 142, 38th Congress, 2d Session. It may be noted in passing that while the Senate Resolution asked for an investigation of the contracts of 1862, the Committee gave most of its attention to the contracts of 1863. The committee reported that the *Chimo*

was a failure; that some of the Government officers had blundered; that changes had been ordered for the whole *Chimo* class; that there had been a miscalculation in the displacement, and that additions and alterations were made after the contracts were entered into.

Seven days after the conclusion of that investigation the Senate adopted the following resolution presented by Senator Nye (see Ex. Doc. 18, Sen., 39th Cong., 1st Session):

> "In the Senate of the United States, March 9, 1865.
>
> "*Resolved*, That the Secretary of the Navy be requested to organize a board, of not less than three competent persons, whose duty it shall be to inquire into and determine how much the vessels of war and steam machinery contracted for by the department in the years 1862 and 1863 cost the contractors over and above the contract price and allowance for extra work, and report the same to the Senate at its next session. None but those that have given satisfaction to the department to be considered.

The report of this board, dated December 23, 1865, was transmitted by the Secretary of the Navy to the Senate on the 30th of January, 1866, and on the 31st of January was, by the Senate, referred to the Committee on Naval Affairs, and ordered to be printed. (See p. 518, 2d Col. of the Cong. Globe, 1st Session, 39th Congress.) It has been customary to call this the Selfridge Report because the president of the board was Commodore Thomas O. Selfridge. Its technical title is Sen. Ex. Doc. 18, 39th Congress, 1st Session.

On the 22d of March, 1866, Senator Nye, for the committee to which the Selfridge report was referred, reported a bill to the Senate (No. 220) for the relief of certain contractors for the construction of vessels of war and steam machinery, which was read and passed to a second reading. (See p. 1561, Cong. Globe, 39th Cong., 1st Session.)

Accompanying this bill was Senate Report No. 45, 39th Cong., 1st Session, the title of which is as follows:

"Thirty-ninth Congress, First Session. Senate.
Rep. Com. No. 45.
"In the Senate of the United States.

["MARCH 22.—Ordered to be printed.]

"Mr. Nye made the following—

"REPORT.

"(To accompany Bill S. No. 220.)

"The Committee on Naval Affairs, to whom was referred the communication of the Secretary of the Navy, of the date of January 30, 1866, inclosing a copy of the record of the board of Naval officers, organized pursuant to the resolution of the Senate of March 9, 1865, report:"

This report contained *inter alia* all the conclusions of the Selfridge Board, and also a table showing the prices of labor and material from January, 1862, to December, 1864, inclusive. It is printed *in toto* at pp. 1884 to 1888, Cong. Globe.

This bill (Senate 220), as it came from the Committee, proposed to pay to the contractors what the vessels cost them as found by the Selfridge Board. (See pp. 1883, 1884, 1885, Cong. Rec., 1st Session, 39th Congress.) The bill was discussed frequently and fully; as amended in and passed by the Senate, on the 27th of April, 1866, it read as follows (see p. 2232, *supra*):

> "That the Secretary of the Treasury be directed to pay, out of any money in the Treasury not otherwise appropriated, to the several parties the awards made in their favor by the naval board organized under the resolution of the Senate adopted March 9, 1865, the awards being made under date of December 23, 1865, and reported to the Secretary of theNavy: Provided, That the payment shall not, in any case, exceed

twelve per cent. upon the contract price, except in the case of the *Comanche* in which case the award shall be paid in full.

"Sec. —. And be it further enacted, That in the cases of Donald McKay, of Boston, Massachusetts, who built the *Ashuelot* and machinery, and Miles Greenwood, of Cincinnati, Ohio, who built the *Tippecanoe*, whose contracts have been completed to the satisfaction of the Department, and who were prevented from appearing before the naval board, they shall be entitled to the same rate of compensation as is authorized to be paid to other parties building the same class of vessels and machinery; and such payment to be made to them, out of any money in the Treasury not otherwise appropriated, under the supervision of the Secretary of the Navy, provided the evidence submitted for his examination fully establishes the right of the said parties to such amount of compensation.

"And be it further enacted, That the sums hereby authorized to be paid to the parties herein named shall be in full for all work done by said parties on the vessels and machinery for which said sums are respectively paid, and if accepted by any of said parties shall be on that condition; and none of said parties shall be entitled to said sums until he shall execute a receipt in full for said claim."

Senate Bill 220 was received by the House of Representatives on April 28 (p. 2251), and on May 3 was read a first and second time and referred by the House to the Committee on Claims (p. 2374). It remained in committee until the next session, and was reported by Mr. Sloan from that committee February 15, 1867, with an amendment (see p. 1265, Congressional Globe, 2d Session, 39th Congress), striking out all after the enacting clause and inserting the following substitute:

"That the Secretary of the Navy is hereby authorized and directed to investigate the claims of the

following contractors for building iron and iron-clad vessels of war and steam machinery for the same, namely: T. F. Rowland, Harrison Loring, Zeno Secor & Co., The Novelty Works, Posey, Jones & Co., William Perrine, James B. Eads, George W. Quintard, Z. & F. Secor, William Perrine and Z. & F. Secor, Alexander Swift & Co., and Niles Works, Snowden & Mason, Donald McKay, Miles Greenwood, McCord & Bestor, Donahue, Ryan & Secor, A. W. Denmead & Sons, the Stover Machine Company; and said investigation to be made upon the following basis: He shall ascertain the additional cost which was necessarily incurred by each contractor in the completion of his work by reason of any changes or alterations in the plans and specifications required, and delays in the prosecution of the work occasioned by the Government, which were not provided for in the original contract, but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged time for completing the work, rendered necessary by the delay resulting from the action of the Government aforesaid, and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractor; and from such additional cost, to be ascertained as aforesaid, there shall be deducted such sum as may have been paid each contractor for any reason heretofore, over and above the contract price; and shall report to Congress a tabular statement of each case, which shall contain the name of the contractor, a description of the work, the contract price, the whole increased cost of the work over the contract price, and the amount of such increased cost caused by the delay and action of the Government as aforesaid, and the amount already paid the contractor over and above the contract price."

So much of the report of Mr. Sloan from House Committee on Claims (H. R. Report No. 17, 39th Cong., 2d Ses-

sion), as relates to the proposed change is set out in full at the conclusion of this brief. After numerous discussions and amendments Senate Bill 220 passed the House in the following form, on the 22d February, 1867 (p. 1478, Part 2, Cong. Globe, 2d Sess., 39th Cong.):

> "Amend the bill of the Senate by striking out all after the enacting clause, and inserting in lieu thereof the following:
>
> "That the Secretary of the Navy is hereby authorized and directed to investigate the claims of all contractors for building vessels of war and steam machinery for the same, said investigation to be made upon the following basis: He shall ascertain the additional cost which was necessarily incurred by each contractor in the completion of his work by reason of any changes or alterations in the plans and specifications required in the prosecution of the work occasioned by the Government which were not provided for in the original contract; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged time for completing the work, rendered necessary by the delay resulting from the action of the Government aforesaid, and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractor; and from such additional cost, to be ascertained as aforesaid, there shall be deducted such sum as may have been paid each contractor for any reason, heretofore, over and above the contract price, and shall report to Congress a tabular statement of each case, which shall contain the name of the contractor, a description of the work, the contract price, the whole increased cost of the work over the contract price, and the amount of such increased cost caused by the delay and action of the Government as aforesaid, and the amount already paid the contractor over and above the contract price."

A conference committee was appointed by both Houses which reported as follows (p. 1661, Part 3, Congressional Globe, 2d Session, 39th Congress):

"Relief of Government Contractors.

"Mr. Sloan submitted the following report:

"The committee of conference on the disagreeing votes of the two Houses on the bill (S. No. 220) for the relief of certain contractors for the construction, of vessels of war and steam machinery having met after full and free conference, have agreed to recommend, and do recommend, to their respective Houses, as follows:

"That the Senate agree to the House amendment, with the following amendments:

"After the word 'same' in the fourth line insert the words 'under contracts made after the 1st day of May, 1861, and prior to the 1st day of January, 1864.'

"Add to the House amendment the following amendments:

"Provided, That the Secretary of the Navy, under the resolution, shall investigate the claim of W. H. Webb for constructing the steamer *Dunderburg*, applying the provisions of this resolution in such investigation, except that proper consideration shall be given to the increased cost incurred by said Webb by reason of any alteration in the plans and specifications for the *Dunderburg* made during the progress of the work, whether such alterations were provided for in the original contract or not, when payment for the same was not embraced in the contract price.

J. C. SLOAN,
C. DELANO,
Managers on the part of the House.
T. A. HENDRICKS,
H. B. ANTHONY,
W. T. WILLEY,
Managers on the part of the Senate."

The conference report was adopted by both Houses and the bill became a law on the 2d of March, 1867 (see 14 Stat. 424), reading as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Navy is hereby authorized and directed to investigate the claims of all contractors for building vessels-of-war and steam machinery for the same under contracts made after the first day of May, eighteen hundred and sixty-one, and prior to the first day of January, eighteen hundred and sixty-four, and said investigation to be made upon the following basis: He shall ascertain the additional cost which was necessarily incurred by each contractor in the completion of his work by reason of any changes or alterations in the plans and specifications required, and delays in the prosecution of the work occasioned by the Government, which were not provided for in the original contract; but no allowance for any advance in the price of labor or material shall be considered, unless such advance occurred during the prolonged time for completing the work rendered necessary by the delay resulting from the action of the Government aforesaid, and then only when such advances could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractor, and from such additional cost, to be ascertained as aforesaid, there shall be deducted such sum as may have been paid each contractor for any reason heretofore over and above the contract price, and shall report to Congress a tabular statement of each case, which shall contain the name of the contractor, a description of the work, the contract price, the whole increased cost of the work over the contract price, and the amount of such increased cost caused by the delay and action of the Government aforesaid, and the amount already paid the contractor over and above the contract price: *Provided*, That the Secretary of the Navy, under the resolution, shall investigate the claim of W. H. Webb for constructing

the steamer *Dunderburg*, applying the provisions of this resolution in such investigation, except that proper consideration shall be given to the increased cost incurred by said Webb by reason of any alteration in the plans and specifications for the *Dunderburg* made during the progress of the work, whether such alterations were provided for in the original contract or not, when payment for the same was not embraced in the contract price.

"Approved, March 2, 1867."

This act was an elaboration of the joint resolution of June 25, 1864, for the relief of John Ericsson (13 Stat. 409), which recited that improvements were made in consequence of service of other vessels in actual conflict, and provided for the purchase from John Ericsson by the Government of the impregnable floating battery, the *Puritan*, at her actual cost.

Soon after its enactment Congress appropriated one hundred and seventy-nine thousand dollars to pay for losses sustained by the contractors in building the monitor *Camanche* (Act of March 30, 1867, 15 Stat. 353).

The Secretary of the Navy did not undertake to personally investigate the claims of all contractors for building vessels of war, and called to his assistance a board of naval officers composed of Commodore Marchand, Chief Engineer J. W. King and Paymaster Edward Foster. Their report, dated November 26, 1867, was transmitted to the Senate by the Secretary of the Navy December 4, 1867, and was numbered Senate Ex. Doc. No. 3, 40th Congress, 2d Session.

The act of Congress had called for a tabular statement of each case containing; (1) the name of the contractor; (2) a description of the work; (3) the contract price; (4) the whole increased cost of the work over the contract work; (5) and the amount of such increased cost caused by the delay and action of the Government as aforesaid; (6) and the amount already paid the contractor over and above the contract price.

The report of the Marchand Board transmitted to the Senate by the Secretary of the Navy consisted almost entirely of a tabulated statement. In it are found columns headed as follows (1) name of contractor; (2) description; (3) contract price; (4) whole increased cost of the work over the contract price *as claimed by the contractors*; (5) amount of such increased cost caused by the delay and action of the Government as determined by the board *to be due*; (6) amount already paid the contractors over and above the contract price.

The Board said, *inter alia*, nothing was due on the *Squando*, the *Nauset* and *Ashuelot*, and Donald McKay and his fellow-contractors thereafter sought patiently and indefatigably the relief held out to them by Congress, and denied by the Marchand Board.

At the Second Session of the 40th Congress, on the fifth of February, 1868, Senator Drake offered a Joint Resolution (p. 981, Cong. Globe) No. 100, looking to a reference of the subject to the Court of Claims. This resolution passed the Senate (p. 3150, Cong. Globe, 2d Session, 40th Cong.), but was not reached in the House. At the Second Session of the 41st Congress Senator Drake offered Senate Joint Resolution No. 92, which, after passing both houses, was vetoed by President Grant. The veto message is as follows: See Richardson's Messages and Papers of the Presidents, Vol. VII, p. 125, and p. 1023, Congressional Globe, 3d Session 41st Cong., Part 2.

> "EXECUTIVE MANSION, February 7, 1871.
>
> "*To the Senate of the United States:*
>
> "I hereby return without my approval Senate resolution No. 92, entitled "resolution for the relief of certain contractors for the construction of vessels of war and steam machinery," for the following reasons:
>
> "The act of March 2, 1867, 14 U. S. Statutes at Large, p. 424), directs the Secretary of the Navy—
>
> 'to investigate the claims of all contractors for

building vessels of war and steam machinery for the same under contracts made after the 1st day of May, 1861, and prior to the 1st day of January, 1864; and said investigation to be made upon the following basis: He shall ascertain the additional cost which was necessarily incurred by each contractor in the completion of his work by reason of any changes or alterations in the plans and specifications required, and delays in the prosecution of the work occasioned by the Government, which were not provided for in the original contract; but no allowance for any advance in the price of labor or material shall be considered unless such advance occurred during the prolonged time for completing the work rendered necessary by the delay resulting from the action of the Government aforesaid, and then only when such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractor.' . . .

"The present joint resolution transfers the investigation to the Court of Claims, and repeals 'so much of said act as provides against considering any allowance in favor of any such parties for any advance in the price of labor and material, unless such advance could not have been avoided by the exercise of ordinary diligence and prudence on the part of the contractor.' It seems to me that the provision thus repealed is a very reasonable one. It prevents the contractor from receiving any allowance for an advance in the price of labor and material when he could have avoided that advance by the exercise of ordinary prudence and diligence. The effect of the repeal will be to relieve contractors from the consequences of their own imprudence and negligence. I see no good reason for thus relieving contractors who have not exercised ordinary prudence and diligence in their business transactions.

"U. S. GRANT."

The Senate Joint Resolution No. 92, was as follows (See Congressional Globe of July 8, 1870, p. 5368, 2d Session, 41st Congress, Part p. 6, 1869–70):

> "That the claims for building vessels of war and steam machinery, referred to in the act for the relief of certain contractors for the construction of vessels of war and steam machinery, approved March 2, 1867, be referred to the Court of Claims, which is hereby vested with jurisdiction under said act, and whose duty it shall be to investigate and determine the claims of the several parties upon the principles and rules laid down in said act, except as hereinafter provided; and the finding of said court in the premises shall have the same force and effect as any other judgment of said court; but no claim shall be considered by said court unless the same be presented therein within one year after the passage of this resolution; and so much of said act as provides against considering any allowance in favor of any such parties for any advance in the price of labor or material, unless such advance could not have been avoided by the exercise of ordinary prudence and diligence on the part of the contractor, be and the same is hereby repealed."

At the December term, 1873, the Court of Claims decided, in the McCord Case, 9 C. C. 155, that nothing was due the contractor for the Monitor *Etlah* for the increased cost caused by the United States. Its legal conclusion agreed with that of the Marchand Board, which found that there was nothing "due" to McCord for the *Etlah*. But the court did what the Marchand Board had refused. It found, as a fact, that the increased cost to the contractor caused by the delay and action of the Government remaining unpaid was $174,445.75 (see pp. 157, 158, 9 C. C.), vindicating the assertions of this class of claimants that the Marchand Board, by the addition of a few words to the titles of their tabulated statement, had avoided compliance with the Act of March 2, 1867. On March 3, 1873, the 42d Congress

referred the claim of Miles Greenwood to the Court of Claims in the language of the Act of March 2, 1867 (17 Stat. p. 764). The judgment rendered, $76,730, by the Court of Claims (14 C. C. p. 597), again showed that Commodore Marchand and his fellow officers had in mind "what the board determined to be due," rather than the instructions of Congress, requiring them to report the facts.

The 42d Congress also appropriated directly to the heirs of George C. Bestor $125,000 for the *Shiloh* (17 St. 733), which had been similarly rejected by the Marchand Board. It also appropriated fifty thousand dollars (Act of June 1, 1872, 17 Stat. 671) to pay Charles W. Whitney, and twenty-three thousand three hundred and ten dollars to pay J. S. Underhill (Act of June 10, 1872, 17 Stat. 691) for the *Keokuk*; and the 43d Congress appropriated forty-six thousand seven hundred and fifteen dollars and eight cents to pay Daniel S. Mershon, Jr., for the *Cimarron* (Act of March 2, 1875, 18 Stat. 635). The *Keokuk* and *Cimarron* were not considered by the Marchand Board "as within its province." At the October Term, 1877, this court, in the Chouteau Case, 95 U. S. 61, affirmed the decision of the Court of Claims in McCord *vs.* United States, 9 C. C. 155.

After the veto by President Grant there seems to have been no united effort to re-enact or to enforce the Act of March 2, 1867, and after the passage of the Cimarron Act there was no legislation for the relief of any of the gunboat contractors until the enactment by the 51st Congress of the law now under consideration. Its legislative history is very simple. It was introduced in the Senate, was favorably reported from the Senate Committee on Claims, passed the Senate unanimously, passed the House without amendment and became a law August 30, 1890, in the exact terms in which it was first presented in the Senate. The report of Senator Higgins (Senate, 444, 51st Cong. 1st Session) reproduced the Marchand Report (Senate, Ex. Doc. No. 3, 40th Cong. 2d Session) in full, and was devoted largely to showing

that that board had not complied with the requirements of the Act of March 2, 1867, and that the relief contemporaneously held out to these claimants was still denied to them.

The Act of March 2d, 1867, (14 Stat. 424) has never been repealed. Donald McKay and others claimed that it had never been executed. At every Congress from the 38th to the 51st inclusive, the claims of this class of contractors have been considered by the legislature. At nearly every Congress some action has been taken on this class or upon individuals belonging to the class.

The words "prolonged term" to which the attention of the court is invited by the appellants is first found in the amendment reported by Mr. Sloan on the 15th of February, 1867. Senate Bill 220, 39th Congress, as it passed the Senate had for its foundation the action of the Selfridge Board in ascertaining—

> "how much the vessels of war and steam machinery . . . cost the contractors over and above the contract price and allowance for extra work."

The House substitute had for its central idea the additional cost which the *Government imposed* upon the contractors. This distinction was clearly pointed out in the report of Mr. Sloan's committee. This report was printed on the 14th of February, 1867, was read on the floor of the House (p. 1265, Cong. Globe, 2d Session, 39th Cong.), and thereafter was accessible to every member of the House and Senate. It was not conclusive as to the reasons animating Congress in the passage of the acts of 1867 and 1890, but it was a clear explanation to every member who chose to read it of the motives animating the draftsman of the House amendment, and was an announcement of the reasons for the enactment of the substitute recommended by the committee.

There were, says the Sloan report, two separate grounds for relief presented by the contractors.

> "(1.) By reason of the delays thus caused by the

> omissions and action of the Government, the claimants, owing to the constantly increasing prices of labor and material *during the progress of the work*, have incurred great loss in the performance of their contracts. (2.) Although no delays were caused by the Government, the contractors lost because they could not foresee the rise in prices and materials."

The report says:

> "The Committee are of opinion that the first ground upon which these claims are based is valid, and furnishes a legal and just rule for the relief of the claimants."
>
> "The committee have also arrived at the conclusion that the claimants are not entitled to relief upon the second ground stated."

The latter conclusion of the committee led to the rejection by the House of the bill as it passed the Senate; the former to the preparation of the substitute. Now, it is clear that the committee had in mind that only such enhancement in prices should be paid for as was caused by the Government, and (second) that the time necessary for completing the vessels should be prolonged by delay resulting from the action of the Government and not by the action of the contractors; and there was no just or equitable reason to distinguish between advances to the end of the contract term and advances that occurred after the expiration of that time, provided the loss was caused by the Government. Increased cost to the contractors not due to the action of the Government was what they sought to exclude, and not advances that occurred at any time during the progress of the work.

In United States *vs.* Wong Kim Ark, 169 U. S. 649 at p. 699, Mr. Justice Gray in delivering the opinion of the court, said, that while debates in Congress are not admissible in

evidence to control the meaning of a statute the remarks in debate are—

> "valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves."

The Chief Justice and Justice Harlan, while disagreeing with the majority as to the judgment to be rendered, were in accord as to the utility of consulting the Congressional Debates (p. 721).

II.

The Plain Language of the Statute.

It appears from the findings in this case that the contractual term for completing the contracts was eleven months (Findings I and II) from August 22, 1863, and that but for the acts and delays of the Government no longer time would have been necessary. It is equally clear that a longer period was, by the Government, rendered necessary for the completion. The prolongation of the period was from July 22, 1864, to November 29, 1865, or a period of sixteen months and seven days. The whole period actually necessary for the completion of the vessel was twenty-seven months and seven days, and this was the prolonged period necessary to complete the vessel, and was rendered necessary by the Government; the sixteen months and a half was not the prolonged period, it was the prolongation of the period. The draftsman recognized the distinction between the actor and thing acted upon in that very sentence, when he speaks of the "advance" in the price of labor instead of saying the "advanced price." If he had meant to exclude from the allowance the contract term, it would have been most natural and most grammatical to have said:

> "But no allowance for any advance in the price of labor or material shall be considered which did not

> occur during the *additional* time for completing the work rendered necessary by delay."

It was held, in United States *vs.* Goldenberg, 168 U. S. 95, p. 103, that the lawmaker is presumed to know the meaning of words and the rules of grammer.

It is clear that in the present case he knew the difference between "advance in price" and "advanced price," and also between "prolonged term" and "prolongation of the term," and that he used the words "prolonged term" advisedly so as to give to the claimant all the increased cost measured by the advance in prices which was necessarily incurred by the contractor by reason of the acts or delays of the Government, if these delays were so appreciable as to prolong the time necessary to complete, and if the contractor could not have avoided the advance by the exercise of ordinary prudence and diligence.

This was doing no injustice to the United States and was a very different thing from reimbursement for the advance in price which fell upon every contractor who agreed during the early part of the war to manufacture for the Government or for any other customer. The basis for the investigation of the claim was limited to the additional cost necessarily incurred by reason of the changes ordered and delays caused by the United States. This excluded all enhancement in cost by reason of advance in prices if not consequent upon the action of the Government, and the clause in controversy being the only one which mentions advance in price may have been inserted partly by abundance of caution to show that the advance in price was in the mind of the law-maker and was part of the cost to be considered by the Marchand Board and by the Court of Claims in the investigation.

Mr. Justice Field, in Bernier *vs.* Bernier, 147 U. S. 242 (p. 246), said:

> "All acts of the legislature should be so construed, if practicable, that one section will not defeat or

> destroy another, but explain and support it. When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the act."

The construction contended for by the Attorney General does violence to the general purpose of the statute, and no good reason is suggested for any desire on the part of Congress to make the distinction he contends for.

It may be said in passing that the contracts in this case (pp. 3 to 10), contained no provision giving to the United States the right to make changes as in the (McCord) Chouteau case, 95 U. S. 61.

III.

Dictum of Lawrence Case.

This statute had been before the Court of Claims on two previous occasions. The claim of Nathaniel McKay for the *Squando* is reported in 27 C. C. 422, and the claim of the appellee for the *Nauset* was decided in 1895, but not reported (for findings and judgment see additional Record, pp. 2 to 12). In both cases upon this branch of the statute the court rendered a general rather than a special verdict. In the Nathaniel McKay case the language is (see p. 427):

> "The cost to said contractors because of the enhanced price of labor, which occurred during the prolonged term for completing the work is the sum of $60,462.

In the Nauset Case, Donald McKay's executor (Additional Rec., p. 10), the finding is:

> "The cost to the contractor because of the enhanced price of labor and material which occurred during

the prolonged term for completing the work is $61,571.67."

There was no opinion in the Nauset case and the opinion in the Squando case is silent upon the present controversy. In the Lawrence case, 32 C. C. 245, where a suit was brought in the Court of Claims under a relief statute identical in its terms with the Act of August 30, 1890, the Chief Justice of the Court of Claims delivered an opinion in which he says that in preceding cases the construction had been put upon the statute that the appellants are now contending for. There is no reason to doubt the correctness of this recital as to the case of Nathaniel McKay (27 C. C. 422). But the reverse was the case in the Nauset suit (See XII, finding, p. 12, Additional Record), and this error would not have crept into the opinion of the Chief Justice, if the question we are discussing had been presented for investigation in the Lawrence case. The order in which the judgments were entered is as follows:

June 27, 1892, Nathaniel McKay for the *Squando*. January 21, 1895, Bliss Exr. of Donald McKay, for the *Nauset*. February 23, 1897, Courtenay, Admr. of Lawrence for the *Wassuc*. April 18, 1898, Bliss, Exr. of Donald McKay for the *Ashuelot*.

Slight scrutiny of the Lawrence decision (32 C. C. 245) will show that the controversy was between two successive contracts for the same work, and that there was no finding by the Court of Claims (32 C. C., pp. 246 to 254) upon which that court or this could have based a judgment if it had been of opinion that the prolonged term was composed of the contract term and the necessary additional time. If on appeal of that case this court had regarded the "prolonged term" as commencing with the end of the contract period and had disagreed with the court below as to which agreement controlled, the findings would have sustained a

judgment. But either because the evidence was not before the court to enable the court to say what was the enhanced cost from rise in prices, upon our present contention, or because the court did not consider the question before it, the findings (which are the voice of the whole court), are silent as to both contracts. These findings were in accordance with Rule 1, Par. 2 of the order of this court, in reference to appeals from the Court of Claims, requiring a finding "of the facts in the case established by the evidence in the nature of a special verdict."

The XV finding (p. 253, 32 C. C.), presents all the alternatives of which, in the judgment of the court, the evidence required consideration. They are, first, that if the prolonged period commenced February 3, 1864, the termination of the first contract period, the increased cost of labor was $36,440.01, and of materials was $55,540.50; and, second, if the prolonged term began July 4, 1864, the termination of the second contract period, nothing should be allowed. As to what would have been the enhanced cost if the prolonged period had included the contract period under either agreement the findings were silent.

In the present case the court below, including the Chief Justice, regarded all of the opinion in the Lawrence case that bears on the present discussion as *dicta* because the very point now presented for discussion did not in that case require consideration. In so doing they committed no error.

Cohens *vs.* Virginia, 6 Wheaton, 264, 399.
United States *vs.* Wong Kim Ark, 169 U. S. 649, 679.

IV.

Conclusiveness of Judgment in the Nauset Case.

Under this statute, Edward P. Bliss, executor of Donald McKay, the present appellee, brought suit in the Court of

Claims for the additional cost to the *Nauset*, and a final judgment was rendered in his favor in 1895 for $101,529.73. Of this sum $61,571.67 was for enhanced cost of labor during the prolonged term, etc. In that cause the question of when the prolonged term commenced was considered by the court on two occasions, first at the trial and second on the motion of Assistant Attorney General Dodge, who made the specific proposition now presented by the United States, to wit, that the prolonged term did not commence until the end of the contract term (finding IX, pp. 1 and 2, Addl. Rec.) There is not the slightest controversy between the appellee and the appellants (see finding XII, p. 12, Addl. Rec.), that there was a final judgment upon this precise question in which the court below carried back the commencement of the prolonged period very far into the contract term. If the United States had desired to review that decision it could readily have done so by obtaining from the Court of Claims additional findings, or, if necessary, by applying to this court for a *mandamus* to separate the finding X, at page 10 of the Additional Record.

> Cromwell *vs.* County of Sac, 94 U. S. 351 and see Southern Pacific Railroad Company *vs.* United States, 168 U. S, p. 1, and cases cited at p. 49, *et sequentur.*

It was not necessary to plead the former judgment, but it could be introduced as evidence under the general issue.

> P. 101, Aurora City *vs.* West, 7 Wall. 82.

Besides, the Court of Claims is not bound by any special rules of pleading.

> United States *vs.* Burns, 12 Wallace, 246.

For the conclusiveness of judgments in the Court of Claims, see p. 647 in United States *vs.* O'Grady, 22 Wall. 641. Indeed, it is the finality of the unappealed judgments

of that court that causes this court to entertain appeals from it.

See p. 479 in United States *vs.* Jones, 119 U. S. 477.

As it would not be proper for the Supreme Court to review its former interpretation of the law in a case a second time before it (see Chaffin *vs.* Taylor, 116 U. S. 567), so the Court of Claims did not err in following in this case its interpretation of the words "prolonged term" in this statute in a former suit between the same parties.

JOHN S. BLAIR,
Attorney for Appellee.

APPENDIX.

"Thirty-ninth Congress, Second Session. House of Representatives. Report No. 17.

"CONTRACTORS FOR WAR VESSELS.

"[To accompany Bill S. No. 220.]

"FEBRUARY 14, 1867.—Ordered to be printed.

"Mr. SLOAN, from the Committee of Claims, made the following—

REPORT.

"**The Committee of Claims, to whom was referred Senate Bill 220, for the relief of certain contractors for the construction of vessels of war and steam machinery, having had the same under consideration, report:**

"That said bill grants relief to more than forty contractors, who claim that they have sustained damage and suffered loss in the execution of their contracts with the government.

"These claims for relief are based, so far as ascertained, upon two separate grounds.

"1. That, by the terms of the contracts, the government was required to furnish plans and working drawings as fast as required by the contractors, during the progress of the work; that in many of the cases the government failed to furnish the plans and drawings as soon as needed, and that the work was suspended for longer or shorter periods of time in the different cases in consequence thereof; that owing to imperfectly formed plans for the construction of the new class of vessels required, and that the building of such vessels was of necessity, in a great degree, experimental, the government ordered, in many cases, material and important alterations in the plans and specifications for building the vessels and machinery during the process of construction, which also caused delays in the fulfilment of the contracts. And, although the Navy Department has undertaken to pay for all alterations thus made, the amount allowed was insufficient to make good

the loss sustained by the claimants in consequence thereof. And that, by reason of the delays thus caused by the omissions and action of the government, the claimants, owing to the constantly increasing prices of labor and materials during the progress of the work, have incurred great loss in the performance of their contracts.

"2. That these contracts were made during the early part of the war, and before it had produced any advance in the prices of labor and materials, and when it was difficult, if not impossible, to foresee its long continuance or its effects in increasing prices. That these claimants went on and fulfilled their contract after it became apparent that to do so would involve them in loss, relying upon the justice and generosity of the government to save them from loss thus incurred in completing vessels which were indispensable for the government in prosecuting the war to a successful termination.

"The committee are of opinion that the first ground upon which these claims are based is valid, and furnishes a legal and just rule for the relief of the claimants. Nearly all of these contracts require the work to be done in accordance with plans and specifications prepared by the government and stated in the contracts to be annexed thereto. And we think that it was the duty of the government (except in one or two instances), to furnish all the plans and drawings necessary for the prosecution of the work as fast as needed, and if loss was occasioned to the contractors by the delay of the government in this regard, it is legally liable to indemnify them for such loss, and that the government is also liable to pay the necessary increased cost of any alterations in construction caused by its subsequent action, not provided for in the contracts. The committee, however, do not express any opinion as to whether the amounts already allowed and paid to tl e claimants by the Navy Department on this account, have been sufficient to indemnify them for such loss and damage. This can only be ascertained by a full investigation of each case.

"The committee have also arrived at the conclusion that the claimants are not entitled to relief upon the second ground stated, and that there is no principle upon which the government can be called upon to indemnify contractors for loss which they may sustain in the performance of their contracts in consequence of an advance in the prices of labor and materials. This is a risk which contractors clearly take, and by the consequences of which they must abide. A number of cases have already been presented to the committee, claiming damages by contractors with the government arising from the increased price of labor and materials during the time in which the contract was to have been performed; but the committee have uniformly rejected such claims, where the government did not cause the delay in the fulfilment of the contract. To establish a different rule would be to subject the government to a claim for damage on almost every case of contract during the rebellion, when the contract has not proved as profitable to the contractor as he anticipated. Indeed, it would convert the government into an insurer to the contractor that he should in no case suffer any loss, but should be certain to enjoy all the advantage of a favorable agreement. This rule would, in the opinion of the committee, subject the government to a large number of claims for damages not embraced in the class now under consideration, and would lead to a probable liability large enough to be dangerous and alarming.

The committee are further satisfied that the rule of relief adopted by the Senate bill 220, is partial and unjust, both to the claimants and the government. There was, as before stated, over forty of these claims in which relief is granted by this bill; there are two other claims of the same kind provided for by a subsequent resolution of the Senate, for the relief of McCord and Bestor, of St. Louis; and a number of others have been presented to the

committee, not otherwise acted upon, and it is understood that there are still others which will be presented if favorable action is taken on those before the committee. But they are all cases of distinct contracts between the government and different contractors, and have no proper connection, except in the fact that several classes of work are provided for, and the contracts are all for work in one of the classes; but the circumstances of failure to furnish the plans and drawings, and the periods of such failure and the alterations ordered by the government, and upon which the committee think the claim for relief can alone be based, are different in different cases. The committee think a proper determination of these claims requires that each case shall be examined separately, and the amount of loss for which the government is justly liable awarded without regard to the action taken in other cases, except so far as the principle governing the allowance may be applicable. A board of naval officers was, by resolution of Congress, authorized and required to investigate and report the excess of cost of the work over the contract price in each of these cases. The report made by such board shows that the losses sustained by different contractors in the construction of the same class and kind of work, under contracts executed at about the same time and for about the same price and amount of work, varies greatly."